

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	)	1997 OAL Determination No. 6
Request for Regulatory	)	
Determination filed by	)	[Docket No. 90-042]
LEGISLATOR TIM LESLIE	)	
concerning a "Protocol"	)	September 9, 1997
issued by THE	)	
SUPERINTENDENT OF	)	Determination Pursuant to
PUBLIC INSTRUCTION,	)	Government Code Section 11340.5;
THE STATE	)	Title 1, California Code of
DEPARTMENT OF	)	Regulations, Chapter 1, Article 3
EDUCATION and THE	)	
COUNCIL FOR PRIVATE	)	
POSTSECONDARY	)	
EDUCATIONAL	)	
INSTITUTIONS <sup>1</sup>	)	
_____	)	

Determination by: JOHN D. SMITH, Director

HERBERT F. BOLZ, Supervising Attorney  
BARBARA ECKARD, Staff Counsel

**SYNOPSIS**

The issue presented is whether or not a "Protocol" issued by the Superintendent of Public Instruction, the State Department of Education and the Council for Private Postsecondary Educational Institutions is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law has concluded that the Protocol is partially valid and partially invalid. In 1990, the Council for Private Postsecondary

Educational Institutions ("CPPEI") was superseded by the Council for Private Postsecondary and Vocational Education ("CPPVE")<sup>2</sup>. The CPPVE subsequently adopted regulations governing the procedures for the granting or denial of applications for approval of private postsecondary institutions.<sup>3</sup> On January 1, 1998, the CPPVE will be replaced by the Bureau for Private Postsecondary and Vocational Education, which will be part of the Department of Consumer Affairs.<sup>4</sup>

### **THE ISSUE PRESENTED**<sup>5</sup>

The Office of Administrative Law ("OAL") has been requested to determine<sup>6</sup> whether or not the 1989 amendment of a "protocol" adopted by the Superintendent of Public Instruction, the State Department of Education, and the Council for Private Postsecondary Educational Institutions is a "regulation" required to be adopted pursuant to the APA. The Request challenges both the "Protocol" in general and the "amendment" of one specific provision concerning whether or not a representative of an affected institution has the right to personally appear and be heard before the Review Committee of the Council ("CPPEI") prior to the Review Committee's recommendation to the CPPEI as to whether the Superintendent of Public Instruction should deny, suspend or revoke any authorization or approval of courses or institutions.

### **ANALYSIS**

#### **I. IS THE APA GENERALLY APPLICABLE TO THE SUPERINTENDENT OF PUBLIC INSTRUCTION, THE DEPARTMENT OF EDUCATION AND THE COUNCIL FOR PRIVATE POSTSECONDARY EDUCATIONAL INSTITUTIONS?**

The Department of Education through the Superintendent of Public Instruction ("SPI") has rulemaking authority to execute its particular responsibilities, programs and functions.<sup>7</sup>

When the Request was submitted to OAL, Education Code section 94305 declared that the SPI

"(b) Adopt regulations in cooperation with the Council (CPPEI) not inconsistent with this chapter governing the exercise of authority comprised by this article which shall be adopted in accordance with ... [the APA]."<sup>8</sup>

Education Code section 94304 empowered the CPPEI to

"(f) ... (1) Advise the Superintendent on the establishment of policy for the administration of this chapter.

(2) Establish a process, in cooperation with the superintendent, for the development and promulgation of rules and regulations. The process developed should not be inconsistent with the provisions of this chapter and allow for the input of consumers and institutions.

(3) Adopt procedures necessary or appropriate for the conduct of its work and the implementation of this chapter consistent with rules and regulations."<sup>9</sup>

Effective July 1, 1990, the Council for Private Postsecondary and Vocational Education ("CPPVE") was established with sole rulemaking authority for regulating private postsecondary or vocational educational institutions operating in California.<sup>10</sup> Education Code section 94305 was amended, effective January 1, 1991 to specifically require the CPPVE to adopt regulations "to ensure that institutions will receive adequate notice and a full opportunity to be heard concerning actions to deny, suspended, or revoke approval or to place an institution on probation."<sup>11</sup>

Therefore, at the time the request was filed, the APA applied to the SPI and the Department of Education. After January 1, 1991, the rulemaking authority shifted from (1) the SPI and the Department of Education to (2) the CCPEI and later to its successor agency, the CPPVE.

## **This Request for Determination**

This Request for Determination was submitted to OAL by former Assemblyman Tim Leslie on August 24, 1990. In his Request for Determination, Mr. Leslie stated the following:

"In January 1987 the Council and the Superintendent of Public Instruction Honig adopted rules and regulations setting forth the procedures for the operation of the Council and to implement and make specific the law enforced and administered by the Council, Superintendent and SDE. Said rules and regulations were last amended in September 1989. A copy of the version of the Protocol last amended in September 1989 is attached and marked Exhibit A.

"The protocol sets forth the rules under which the Council operates in recommending to the Superintendent that applications for approval of private postsecondary institutions be granted or denied, and further sets forth the rules governing the procedure to be followed when it recommends that a private university's application for renewal of its authorization to operate be denied pursuant to Education Code section 94310.2. . . .

"The SDE and Council keep changing one of the more fundamental matters governed by the protocol -- whether a representative of an affected institution has the right to personally appear and be heard before the final recommendation is given to the Superintendent. Prior to the September 1989 amendment of the "protocol," when the recommendation to the Council for Private Postsecondary Educational Institutions was to deny the application of a private university for renewal of its authorization to operate, the university was permitted to appear and be heard *before the Council acted upon said recommendation and made its own recommendation to the California Superintendent of Public Instruction*. On September 1, 1989, the Council for Private Postsecondary Educational Institutions and the California Superintendent of Public Instruction amended the "protocol" without complying with any of the procedural requirements of the APA to deny the right of an affected university to appear and be heard before the

review committee of the Council before it made its recommendation to the Superintendent of Public Instruction." (Emphasis added.)

In addition to this specific challenge, Mr. Leslie requests an OAL determination regarding the "protocol." The "protocol" that was submitted for OAL review is identified as "Amended 1989."

## **II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?**

Government Code section 11342, subdivision (g), defines "regulation" as:

*"... every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . [Emphasis added.]"*

Government Code section 11340.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

*"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . . [Emphasis added.]"*

In *Grier v. Kizer*,<sup>12</sup> the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"<sup>13</sup>

# 1. **The Specific Objection to the 1989 "Protocol"**.

Mr. Leslie's Request states

"On September 1, 1989, the Council for Private Postsecondary Educational Institutions *amended the "protocol"* without complying with any of the procedural requirements of the APA *to deny the right of an affected university to appear and be heard before the review committee of the council* before it made its recommendation to the Superintendent of Public Instruction." (Emphasis added.)

This Request statement omits one step in the process. The 1989 Protocol, Article 139, required that the Review Committee's recommendation be referred first to the full Council ("CPPEI") for a vote. Only then was the recommendation forwarded

to the Superintendent.

Because the "September 1989 Protocol" does not show the prior text of the underlying Protocol, there is no way to verify whether or not an affected party ever had a specified right to appear and be heard by the review committee. OAL cannot review a document that is not part of the record. Additionally, it would be an anomaly to find that the underground regulatory scheme has been amended or is incomplete, thereby implying that the prior underground regulation is somehow desirable. It is not the "amendment" of the Protocol that is in issue. The fundamental question is whether the 1989 Protocol, which is the only document before us, is an underground regulation.

Complicating this issue is the fact that at the time the "protocol" was amended (September 1989), Education Code section 94330 set forth requirements for institutions applying to operate in California.

Subdivision (c) stated that:

"Following review of such application and any other further information submitted by the applicant, or required in conformity with Sections 94310 and 94311, and such investigation of the applicant as the superintendent may deem necessary or appropriate, the superintendent shall either grant or deny approval or authorization to operate to the applicant. The provision of Chapter 5 (*commencing with Section 11500*) of Part 1 of Division 3 of Title 2 of the Government Code shall be applicable to any determination of the superintendent made pursuant to this section." (Emphasis added.)

In 1989-1990, the Superintendent was required to follow Government Code section 11500, which sets forth administrative adjudication procedures that provide for notice and opportunity to be heard. The Department of Education is one of the enumerated agencies in Government Code section 11501.<sup>14</sup>

Government Code section 11500, in effect at the time period in question (September 1989) defined an adjudicatory hearing as

"a state agency hearing which involves the personal or property rights of an

individual, the granting or revocation of an individual's license, or the resolution of an issue pertaining to an individual. However, the procedures governing such a hearing shall include, but not be limited to, all of the following:

- (1) Testimony under oath.
- (2) The right to cross-examination and to confront adversary witnesses.
- (3) The right to representation.
- (4) The issuance of a formal decision.

For the purposes of this subdivision, an 'adjudicatory hearing' shall not be required to include any informal factfinding or informal investigatory hearing. However, nothing in this subdivision shall be construed to prohibit an agency from providing an interpreter during any such informal hearing."

Education Code section 94333 contained a similar provision for agents' permits, including the denial, revocation, suspension or termination of temporary and regular permits. Subdivision (f) stated that

"... The provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code shall be applicable to *any determination of the superintendent* made pursuant to this section." (Emphasis added.)

In September 1989, the Department of Education's section 18827 of Title 5 of the California Code of Regulations specified "Hearing Procedures" that declared:

" (a) Any person or institution whose application for an agent's permit, approval, authorization, or Certificate of Authorization for Service has been denied may file a request within 30 calendar days after mailing of the final notice of denial for a hearing. Such request shall be in writing and addressed to the superintendent in care of the Office of Private Postsecondary Education, 721 Capitol Mall, Sacramento, California 95814. The request shall be deemed filed upon receipt by the Office.



(b) *All proceedings* to determine the validity of actions to deny, suspended or revoke approvals, authorizations, Certificate of Authorization for Service, or agents' permits are governed by the Administrative Procedure Act (commencing with Section 11500 of the Government Code). The Accusation or the Statement of Issues shall be 'Before the Superintendent of Public Instruction of the State of California' and filed by the Office of Private Postsecondary Education.

(c) Each case shall be heard by the hearing office sitting alone." (Emphasis added.)

It is not clear if the phrase "all proceedings" includes the Review Committee's "Closed session" or if the Review Committee meeting is a preliminary step to the formal hearing.

The Request and the Department of Education's Response did not address this issue. The "protocol" is also silent on this issue. There is not enough information for OAL to determine if the statute and/or regulation granted a right of notice and hearing at the Review Committee's "closed session in September of 1989."

What OAL can review are the following provisions contained in Articles 138 and 139 of the September 1989 "protocol" that deal with the Review Committee's procedures.

## ARTICLE IX. APPEALS PROCESS

### 138. Basis for Invoking the Appeals Process

"Pursuant to Education Code Sections 94310 and 94311, the staff of the Private Postsecondary Education Division (PPED) is responsible for working with each institution on issues of compliance with the law, and appropriate standards in the operation of private postsecondary institutions. When the staff is satisfied that an institution is unable or unwilling to remain in, or come into compliance, the institution will *be notified in writing* of the area or areas of concern, citing the specific applicable Education Code provision, regulations or other standards, and that failure to

correct the matter will jeopardize its authorization or approval to operate. Any and all materials and information to be presented to the Review Committee relative to an adverse action *shall be furnished by PPED to the Review Committee at least fifteen (15) working days prior to the meeting of the Review Committee at which the matter will be considered.*

### 139. Review Procedures

“Education Code Section 94305(d) requires the Superintendent to consult with the Council prior to instituting any action to deny, suspended or revoke any authorization or approval of courses or instructions. As a matter of policy, *such consultation is conducted by means of a closed session as described in this section. It is not required by law.* The review is for the purpose of receiving the position of the Superintendent, through his agent PPED. The question to be decided by the Council, through its Review Committee (Committee), is not ultimate culpability but rather, whether reasonable cause exists for PPED to institute a denial, suspension or revocation action. The Council so advises the Superintendent on that question. The procedures are as follows:

- (a) PPED staff will prepare a case file for members of the Council. The case file shall include all responses of the affected institution as to issues of noncompliance raised by PPED.
- (b) *The presentation of the case by PPED and any discussion of the merits of the case shall be in closed session of the Committee.*
- (c) Upon recognition of the Chairperson, any Council member who is present may tender questions to PPED staff. Council members present at the closed session, but not members of the Committee, shall not vote nor enter into the Committee's discussions on the matter before the Committee.
- (d) After reviewing the case file, the oral presentation from PPED staff and the oral responses by the PPED staff to questions of

the Council or Committee members, the Committee shall decide, with respect to the action proposed by PPED, whether to concur or not concur. If the Committee recommends nonconcurrence with the proposed action of PPED, the Committee shall have the right to state its reasons for not concurring.

- (e) After the Committee has reached a decision on the case before it, the Committee's recommendation shall be referred to the full Council. Following receipt of the Committee's recommendation, the Council shall vote to affirm or reject the Committee's recommendation." (Emphasis added.)

At the time the "protocol" was amended, Education Code section 94305 declared in part that:

"It is the intent of the Legislature that the superintendent meet regularly with the council, and that the superintendent work cooperatively with the council in providing leadership and direction in the continuing development of private postsecondary education. The superintendent shall do all of the following:

- (a) Establish policy for the administration of this chapter in cooperation with the council.
- (b) *Adopt regulations in cooperation with the council* not inconsistent with this chapter governing the exercise of authority comprised by this article which shall be adopted in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.
- (c) Prepare annually a proposed budget for the support of activities of the State Department of Education pursuant to this article. The proposed budget shall be presented to the council for its review and recommendations.

- (d) *Consult with the council prior to instituting any action to deny, suspend, or withdraw approval or authorization of courses or schools pursuant to this article.*
- (e) Meet with the council at least twice per year. Take into consideration the advice of the council on all matters where the council is authorized to communicate advice to the director. . .  
" (Emphasis added.)

**First, is the challenged rule either a rule or standard of general application or a modification or supplement to such a rule?**

Articles 138 and 139 apply to all "institutions" authorized or approved to operate as private postsecondary educational institutes. Article 138 provides for notification in writing of "area or areas of concern," cites to applicable laws "or other standards" and sets a deadline for submitting "all material and information" at least 15 days prior to the Review Committee's meeting.

Article 139 declares the Superintendent's consultation with the Review Committee is in a closed session and specifies a procedure to be followed for *all* reviews. Articles 138 and 139 are rules of general application.

**Second, have the challenged rules been adopted to implement, interpret or make specific the law enforced by the agency or govern the agency's procedure?**

As discussed previously, Education Code section 94305 requires the Superintendent of Public Instruction to "Adopt regulations in cooperation with the Council . . . governing the exercise of authority comprised by this article . . ." and "consult with the council prior to instituting any action to deny, suspend or withdraw approval or authorization of courses or schools. . . "

Clearly, articles 138 and 139 are rules governing the Superintendent's and Council's procedures. They add procedural details that implement, interpret or make specific Education Code 94305.

The "closed session" requirement is identified in article 139 as "... a matter of policy ... it is not required by law." Therefore, it is an implementation or interpretation of law, rather than a word by word repetition or summary of existing law.

## **2. The Protocol in General**

The "protocol" is a mix of regulatory and non-regulatory provisions and exempt internal management provisions.

For example, Article 102 specifies the membership of the Council for Private Post Secondary Educational Institutions.

"The membership of the Council is comprised of 15 voting members which includes the Superintendent of Public Instruction or his or her designee, four members appointed by the Superintendent of Public Instruction, five members appointed by the Senate Rules Committee, and five members appointed by the Speaker of the Assembly, along with the ex-officio non-voting members (Education Code, Section 94304(a) ). Pursuant to statute, the ex-officio members are the Director of Consumer Affairs, or his or her designee; The Director of Employment Development, or his or her designee; and the director of the California Postsecondary Education Commission, or his or her designee."

This provision paraphrases the statutory listing contained in Education Code section 94304 that was in existence when the "protocol" was amended in 1989. Article 102 does not "implement, interpret, or make specific" Education Code section 94304 or any other statutory provision of which OAL is aware.

Articles 115 and 116 implement, interpret and make specific Education Code section 94305. Article 115, captioned "Order of Business" declares:

"The order of business at all meetings of the Council, except as otherwise provided, shall be as follows:

(a) Roll Call

- (b) Approval of the minutes
- (c) Approval of the agenda
- (d) Introduction of guests
- (e) Unfinished business
- (f) New business
  - (1) Report of the Private Postsecondary Education Division
  - (2) Report of the Executive Secretary
  - (3) Committee reports
  - (4) Reports of the Council representatives to other bodies
- (g) School Association Reports
- (h) Non-Council members' request to speak
- (I) Review of appeals and complaints
- (j) Announcements
- (k) Adjournment

At the organizational meeting, the election of a Chairperson and Vice-chairperson of the Council shall immediately follow the roll call."

Article 116 declares that

"The agenda shall be determined by the Chairperson of the council in consultation with the Executive Secretary. Any member of the Council who wishes to place an item on the agenda may do so by a request to the Chairperson made at the time in the order of business when a request for approval of the agenda is made. If the Chairperson denies said request, said denial may be overruled by a majority of the voting Council members present and voting. In the event that an item is placed on the agenda in this manner, said item may be considered only as an information item at that meeting, and no substantive action may be taken by the Council relative to that item."

Articles 115 and 116 implement Education Code section 94305's mandate that regulations be adopted that "govern the exercise of authority comprised by this article . . . ." Both articles are rules of general application.

Article 115 places topics into a hierarchy and comes within the narrow scope of the internal management exception discussed in Issue III.

Article 116's limiting of an item placed on the agenda when the chairperson's denial is overruled as being only an "informational item" and prohibiting any "substantive action" at that meeting would apply at every meeting that has this specific sequence of events. This procedure arguably could concern affected educational institutions.

### **III. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?**

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>15</sup> However, rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure, *except one which relates only to the internal management of the state agency.*" (Emphasis added.)

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (g), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall

within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a Board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the Board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*' [Fn. omitted.] . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][<sup>16</sup>]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held a Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ."<sup>17</sup>

Article 115, which was discussed above in Issue II clearly comes within the narrow scope of the internal management exception discussed above. Article 115 merely places topics to be amended at Council meetings into a hierarchy.



Neither the Department of Education, nor the Council for Private Postsecondary and Vocational Education has claimed that the challenged "protocol" is within any established general exception to APA requirements, or indeed within any specific exemption. Both agencies, however, raise novel arguments regarding their lack of responsibility.

The Department of Education's Response dated September 24, 1993 cites to "The Private Postsecondary and Vocational Education Reform Act of 1989" (Statutes of 1989, Chapter 1307, Education Code sections 94300 et. seq.) which became effective January 1, 1991. The Department correctly characterizes this Act as transferring all responsibilities and powers previously held by the Department and the Superintendent to the new Council. ([Education Code section 94306). The Response continues:

"This transfer of responsibility specifically designated in the Education Code is buttressed by Government Code sections 11159, 11160, 11161 and 11162. The particular sections make clear that the transfer imposes all previous duties on the new agency, department or official. As such, neither the CDE or the State Superintendent of Public Instruction have authority to comment on the 'protocol' document."

However, the issue is not the current status of the law and rulemaking authority. In September, 1989 when the "protocol" was amended, the rulemaking authority was vested in the Superintendent of Public Instruction and the Department of Education.

The Council for Private Postsecondary Vocational and Educational's August 20, 1993 Response, signed by Mr. John Ritter, the Council's attorney, disavows any knowledge and/or use of the "protocol". He wrote

". . . The subject of the request is something called 'Protocol' document. I'm not sure how the Council got connected with this request, since to my knowledge *we have never utilized any such document in conjunction with our administrative proceedings*. To underscore this point, I have enclosed a declaration which essentially states that 'Protocol' *is not part of the Council's regulations be they official or underground*. I am, of course,

*referring to the Council after it came into existence as a separate agency on January 1, 1991." (Emphasis added.)*

Again the relevant time period is September 1989 and at that time the Council (CPPVE) did not have rulemaking authority.

Mr. Ritter's Declaration raises an interesting issue. He states that for administrative actions involving suspension, revocation, or denial of approval the Council follows the procedures that are

"... set forth in the Administrative Procedures [sic] Act beginning with Section 11500 of the Government Code. By law, this agency is required to follow the Administrative Procedures [sic] Act when it denies an institution's approval or seeks to revoke that approval. See Education Code Section 94330(1). In addition, this agency is required to use the Attorney General's Office to prosecute those actions. (Ed. Code Section 94339(b) .) Therefore, it is difficult to even envision a situation in which the Council could utilize underground regulations for the purpose of conducting such administrative actions."

We also note that Education Code section 94305 was amended, effective January 1, 1991. It mandates that CCPVE adopt regulations "to ensure that institutions will receive adequate notice and a full opportunity to be heard concerning actions to deny, suspended, or revoke approval or to place an institution on probation." CCPVE has complied with this mandate.<sup>18</sup>

#### **IV. CONCLUSION**

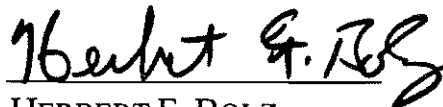
For the reasons set forth above, OAL finds that:

1. In September, 1989 when the Protocol was amended, the sole rulemaking authority was vested in the Superintendent of Public Instruction and the Department of Education;
2. The Superintendent of Public Instruction's and the Department of

Education's quasi-legislative enactments are generally required to be adopted as regulations pursuant to the APA;

3. Parts of the challenged 1989 Protocol are "regulations" as defined in Government Code section 11342, subdivision (g);
4. No exceptions to the APA requirements apply to the parts of the 1989 Protocol found to be regulations; and
5. The parts of the 1989 Protocol found to be regulations violate Government Code section 11340.5, subdivision (a)

DATE: September 9, 1997



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## ENDNOTES

- 1 This Request for Determination was filed by Tim Leslie, former member of the California Assembly, now State Senator, State Capitol, Sacramento, California.

William D. Dawson, former Acting State Superintendent of Public Instruction, 721 Capitol Mall, P.O. Box 944272, Sacramento, CA 94244-2720 filed a Response on September 24, 1993.

George Ritter of the Council for Private Postsecondary and Vocational Education, 1027 10th Street, Fourth Floor, Sacramento, CA 95814, filed a Response dated August 20th, 1993.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "78" rather than "1." Different page numbers are necessarily assigned with each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "1997 OAL Determination No. 6."

- 2 Former Education Code sections 94304 and 94305, repealed by stats. 1995, Chapter 758. See Chapter 7, operative January 1, 1997, commencing with Education Code section 94700. Chapter 7 was repealed July 18, 1997 and a new chapter 7, commencing with section 94700 was effective July 18, 1997 (Stats. 1997, Chapter 78). See also Statutes of 1997, Chapter 77, effective July 18, 1997.
3. The regulatory procedures are published in the California Code of Regulations, Title 5, sections 18880 et seq..
- 4 Education Code sections 94770 (Stats. 1997, Chapter 78, effective July 18, 1997) and 94753.5 (Stats. 1997, Chapter 77, effective July 18, 1997).
- 5 The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a *second* survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of

whether certain material was subject to APA rulemaking requirements.

In November 1990, a *third* survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No. 46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code Section 11347.5, and the second opinion issued afterwards.

In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

- 6 Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*").

- 7 See 1994 OAL Determination No. 1, pp. 4-6 for a thorough discussion of *State Board of Education v. Honig* (1993) 13 Cal.App.4th 720, 16 Cal.Rptr. 2d 727 which analyzed the interrelated functions of the Superintendent of Public Instruction, the Department of Education and the State Board of Education.
- 8 See endnote 2 supra.
- 9 See endnote 2 supra.
- 10 See endnote 2 supra.
- 11 See endnote 2 supra.
- 12 (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
- 13 (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
- 14 Government Code 11501 became inoperative on July 1, 1997, and as of January 1, 1998, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 1998, deletes or extends the dates on which it becomes inoperative and is repealed.
- 15 Government Code section 11346.
- 16 In a footnote at this point, the Court states: "*Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)"
- 17 (1990) 219 Cal.App. 3d 422 436, 268 Cal Rptr. 244, 252-253.
- 18 The following list of sections identifies some of the regulatory provisions authorized by former Education Code section 94305 that are contained in Title 5 of the California Code of Regulations: 74000, subsection (f)(2) (revocation of approval to operate for failure to pay fees or penalties); 74100 (order of probation); 71410 (incomplete application for approval to operate); 71515 (denial of an application to change the location of instruction); 72410 (incomplete application for approval to operate and offer educational programs by regionally accredited out-of-state degree granting institutions operating in California); 72515 (denial of an applications to change location); 71410 (incomplete application for approval to operate); and 74170 (written stipulation regarding probation, conditions or restrictions, suspension, or revocation waives the right to notice, hearing and appeal concerning the subject matter of the stipulation.)